Supreme Court, U.S.
FILED
MAY 29 1996
CLERK

(4)

No. 95-1475

In the Supreme Court of the United States

OCTOBER TERM, 1995

WINSTON & STRAWN, *Petitioner*

v.

HYATT REGENCY PHOENIX HOTEL COMPANY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Winston & Strawn respectfully submits this supplemental brief to call attention to new authority not available at the time of petitioner's last filing. Petitioner suggests that in light of the recent decision in *BMW of North America, Inc.* v. *Gore*, No. 94-896, 64 U.S.L.W. 4335 (May 20, 1996), the Court should grant certiorari, vacate the judgment below, and remand this case for reconsideration, just as the Court did with four cases decided yesterday.[1] In *BMW*, the Court identified "[t]hree guideposts" that are relevant to the constitutionality of a punitive award: the "degree of reprehensibility" of the defendant's conduct; the "disparity between the harm or potential harm" suffered by the plaintiff and the amount of the punitive judgment; and "the difference between the [punitive] remedy and the civil penalties authorized or imposed in comparable cases." Slip op. 14. Here, these considerations demonstrate that, as in *BMW*, the punitive award is "grossly excessive in relation to" the state's interests in punishment and deterrence. *Id.* at 7.

1. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, slip op. 14. Here, that degree of reprehensibility is exceedingly small. We explained in the petition (at 18-21) — and respondent did not disagree in its brief in opposition — that Winston & Strawn itself actually did nothing wrong at all. The sole basis for Winston & Strawn's liability is its merger with Greenfield's firm at the tail end of Greenfield's lengthy representation of HRP and Chanen. There has been no suggestion that Winston & Strawn failed to supervise Greenfield adequately, that its procedures for preventing conflicts were defective, or that the liability here is anything other than *purely* vicarious. This

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[1] *Apache Corp.* v. *Moore*, No. 95-1414 (May 28, 1996); *Combustion Engineering, Inc.* v. *Johansen*, No. 95-1072 (May 28, 1996); *Ford Motor Co.* v. *Sperau*, No. 95-771 (May 28, 1996); *Oxy USA Inc.* v. *Continental Trend*, No. 94-1838 (May 28, 1996).

obviously is not a case where the defendant's misconduct involved violence, "'trickery or deceit,'" or "intentional malice," where the defendant "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful," or where the record discloses "deliberate false statements, acts of affirmative misconduct, or concealment of evidence or improper motive" on Winston & Strawn's part. *BMW*, slip op. 15, 16, 19 (citation omitted). As a consequence, "[i]n this case, none of the aggravating factors associated with particularly reprehensible conduct is present." *Id.* at 15-16. See *id.* at 20.

Even looking only at Greenfield's actions (rather than those of Winston & Strawn), the misconduct here barely tipped the reprehensibility scale. See Pet. 19-20. Greenfield undertook a joint representation of two entities that had a long history of being represented jointly, and HRP was aware that Greenfield also was representing Chanen. Pet. App. 21a. Again, Greenfield's actions involved no trickery, intentional malice, instances of repeated misconduct, or deliberate false statements. And while respondents contend that Greenfield failed to make proper disclosures to HRP (Br. in Opp. 3), "the omission of a material fact may be less reprehensible than a deliberate false statement." *BMW*, slip op. 19. This case therefore "exhibits none of the circumstances ordinarily associated with egregiously improper conduct," meaning that Winston & Strawn's "conduct was not sufficiently reprehensible to warrant imposition of a [multi-million dollar] exemplary damages award." *Id.* at 20.

2. *BMW* held that the ratio of punitive damages to "actual harm inflicted on the plaintiff" may be an "indicium of an unreasonable or excessive punitive damages award." Slip op. 20. That is the case here. In arguing to the contrary, respondents point to the $1.2 million compensatory award, contending that the relevant ratio here is 2:1 or 3:1. Br. in Opp. 10-11. But as we explained in the petition (at 21-22) and reply brief (at 2-4), that contention plainly is incorrect. Greenfield

represented HRP for more than five years prior to joining Winston & Strawn, a period in which the Special Master found against HRP. In this setting, it defies common sense to believe that Greenfield's conduct *after* joining Winston & Strawn is the cause of *all* of HRP's damages. Indeed, the court of appeals itself opined only that "the jury could have reasonably concluded that but for Winston & Strawn's legal malpractice from March 1 to September 22, 1981, HRP could have *significantly reduced*" — not eliminated — its liability. Pet. App. 19a (emphasis added). It therefore is clear that the relevant ratio is substantially greater than 3:1. Because this issue was not addressed by the court below, a remand for exploration of the point in light of *BMW* would be appropriate.

3. *BMW* mandated a comparison of the punitive award "and the civil or criminal penalties that could be imposed for comparable misconduct." Slip op. 23. Here, there are *no* statutory penalties that could be imposed on Winston & Strawn. According "'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue" therefore means that a significant reduction in the award is in order. *Ibid.* (citation omitted). And "[i]n the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the [court below] in this case." *Id.* at 25. Because there is no such history of noncompliance here, the clear teaching of *BMW* is that the award in this case is grossly excessive and should not stand.

4. In opposing the petition, respondents contended principally that "the issues raised by the *BMW* case are not present in this case." Br. in Opp. 10. The decision in *BMW* makes plain that respondents are simply wrong on this point. The Court therefore should grant the petition, vacate the decision below, and remand the case so that it may be reconsidered in light of *BMW*.

Respectfully submitted.

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

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